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Federal Communications Commission
Office of the Secretary

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street Lobby, TW-A325
Washington, DC 20554

IB Docket No. 05-220
IB Docket No. 05-221

Re: Written Ex Parte Presentation

Dear Ms. Dortch:

CTIA - The Wireless Association™ ("CTIA") hereby responds to the recent filings by TMI Communications and Company Limited Partnership ("TMI") and its affiliate TerreStar Networks, Inc. ("TerreStar").¹ In their May 24th Letter, TMI and TerreStar argue that Section 25.157(g) of the FCC's rules applies to 2 GHz MSS and, pursuant to that rule, redistribution of the recently surrendered Boeing and Iridium spectrum requires nothing more than a "ministerial" act.² In their May 27th Letter, they contend that even if the rule does not apply, the Commission may still redistribute the surrendered spectrum without further comment. TMI and TerreStar are wrong on all counts. They offer no reasoned basis for the Commission to override its spectrum management responsibilities to seek comment on the highest and best use of abandoned 2 GHz MSS spectrum.

As an initial matter, TMI and TerreStar cannot credibly assert that the Commission intended its spectrum redistribution rule adopted in April 2003 to apply to 2 GHz MSS – thereby obviating its determination less than three months earlier that the treatment of abandoned 2 GHz MSS spectrum would be determined in accordance with its spectrum management obligations *at the time the spectrum became available*.³ While TMI and TerreStar describe as irrelevant the fact that the *Space Station NPRM* specifically excluded 2 GHz MSS from the proposed redistribution rule, this is hardly the case. By explicitly fencing off 2 GHz MSS from the rulemaking, the FCC provided that the redistribution rule would not apply to 2 GHz MSS.⁴ TMI contends that it has been the "consistent understanding" that the rule applies to 2 GHz MSS,⁵ yet not a single commenter in the rulemaking asked the FCC to alter the express carve-out in the notice to

¹ See Letter from Gregory C. Staple, Vinson & Elkins, Counsel for TMI, and Jonathan D. Blake, Covington & Burling, Counsel for TerreStar, to Marlene H. Dortch, Secretary, FCC (May 24, 2005) ("May 24th Letter"); Letter from Gregory C. Staple, Vinson & Elkins, Counsel for TMI, and Jonathan D. Blake, Covington & Burling, Counsel for TerreStar, to Marlene H. Dortch, Secretary, FCC (May 27, 2005) ("May 27th Letter").

² See May 24th Letter at 2. TMI and TerreStar acknowledge for the first time that public notice is required to reassign the spectrum surrendered by Celsat. See *id.* at 1, 3.

³ See *New Advanced Wireless Services, Third Report and Order*, ET Docket No. 00-258 & IB Docket No. 99-81, 18 FCC Rcd 2223, 2238-40 ¶¶ 29, 32 (2003) ("AWS Third R&O"). The suggestion that the issue of how to treat 2 GHz MSS spectrum abandoned after the initial milestone was "resolved in January 2003" in the AWS Third R&O is untenable. See May 24th Letter at 2 n.5. The AWS Third R&O dealt with the redistribution of 30 MHz of MSS spectrum from licensees that failed to meet their initial milestone (as well as spectrum never licensed). See AWS Third R&O at ¶ 32. The same order in the same paragraph stated that the issue of what to do with 2 GHz MSS spectrum abandoned after future milestones would be decided when such spectrum became available. See *id.* Indeed, TMI and TerreStar appear to acknowledge as much in their May 27th Letter. See May 27th Letter, Att. at 1.

⁴ See *Space Station Licensing Rules and Policies, Notice of Proposed Rulemaking*, IB Docket Nos. 02-34 & 00-248, 17 FCC Rcd 3847, 3864 ¶ 48 & n.54 (2002) ("Space Station NPRM") (stating "the 2 GHz Order did not specify any policy" regarding abandoned spectrum, and "[w]e emphasize that we are not addressing this 2 GHz issue in this proceeding"), cited in *First Report and Order*, 18 FCC Rcd 10760, 10788 ¶ 61 & n.146 (2003) ("Space Station Order").

⁵ See May 24th Letter at 2.

include 2 GHz MSS.⁶ Where the notice expressly takes 2 GHz MSS off the table for comment, it is not possible for the final rule to include 2 GHz MSS without running afoul of the fair notice requirements of the Administrative Procedure Act ("APA").⁷ Accordingly, the now fallow 2 GHz MSS spectrum cannot be redistributed to existing 2 GHz MSS licensees pursuant to Section 25.157(g).

Moreover, even assuming *arguendo* the redistribution rule applies to 2 GHz MSS, TMI and TerreStar misconstrue the rule by treating it as providing for essentially automatic reassignment of abandoned spectrum as long as three licensees remain, requiring nothing more than a "ministerial" act by the Bureau.⁸ To the contrary, Section 25.157(g) and the order adopting it make clear redistribution – even where three licensees remain – is only a presumption. As the *Space Station Order* explains:

If a licensee loses or terminates its license, we will *probably* reassign the spectrum assigned to that licensee *equally among the remaining licensees, assuming that there are a sufficient number of licensees remaining to make reasonably efficient use of the frequency band, and assuming that there is no basis at that time for considering reallocation of the spectrum.*⁹

This clearly calls for more than an automatic or ministerial act; it requires an examination of the facts and circumstances in each case.¹⁰ Any such examination, particularly given the Commission's prior pronouncements about 2 GHz MSS and its overriding spectrum management obligations, compel a public proceeding in this case to consider the best treatment of the abandoned Boeing and Iridium spectrum. In the case of the Celsat spectrum, which reduced the number of surviving 2 GHz licensees to two, public notice is specifically contemplated by the rule.¹¹

In their May 27th Letter, TMI and TerreStar now posit that even in the absence of the rule, the Commission has the authority under Section 316(a) of the Act to redistribute the surrendered spectrum without seeking further comment – simply by treating the redistribution as a "minor modification of the TMI

⁶ Neither TMI nor TerreStar filed comments in response to the *Space Station NPRM*. Of the 2 GHz licensees that did file comments or reply comments, Boeing and ICO, neither commented on the carve-out of 2 GHz MSS from the proposed redistribution rule.

⁷ See 5 U.S.C. § 553(b) (requiring a notice of proposed rulemaking to include "either the terms or substance of the proposed rule or a description of the subjects and issues involved"). The D.C. Circuit has explained that "the notice requirement 'improves the quality of agency rulemaking' by exposing regulations 'to diverse public comment,' ensures 'fairness to affected parties,' and provides a well-developed record that 'enhances the quality of judicial review.'" *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (quoting *Small Refiner Lead Phase-Down Task Force v. United States EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (citations omitted)). Although "[a]gencies should be free to adjust or abandon their proposals in light of public comments or internal agency reconsideration, . . . [t]he necessary predicate . . . is that the agency has alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed." *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994), cited in *Sprint Corp.*, 315 F.3d 369, 376 (D.C. Cir. 2003). No such notice that the rule could include 2 GHz MSS was given here.

⁸ See May 24th Letter at 2 n.8, 3.

⁹ *Space Station Order*, 18 FCC Rcd at 10788 ¶ 61 (emphasis added).

¹⁰ Indeed, although the FCC "presume[d] that a 'sufficient number of licensees' . . . is three or more," it "also reserve[d] the authority to initiate a second processing round or spectrum reallocation rulemaking proceeding as circumstances warrant when there are more than three licensees remaining in operation in cases where it can be shown that our presumption is incorrect." *Id.* at 10788-89 ¶¶ 61, 64. Likewise, if there are only three remaining licenses and one of the three loses its license, the Commission retains discretion to "reassign the newly available spectrum to a new applicant" or "initiat[e] a rulemaking proceeding to determine whether the available spectrum should be reallocated" – or redistribute it upon an extraordinary showing. *Id.* at 10788-89 ¶¶ 62, 64.

¹¹ See 47 C.F.R. § 25.157(g)(2); see also May 24th Letter at 3 ("TMI and TerreStar expect that the Commission will issue a public notice seeking comment on their request for rebuttal [seeking access to former Celsat spectrum] – as allowed for by the Commission's rules . . .").

and ICO authorizations."¹² The request to increase TMI's current 8 MHz spectrum assignment to 20 MHz, however, is a *major* modification that must be placed on public notice under the Commission's rules. Specifically, Section 25.117 treats as major a modification of a satellite authorization "which affects the parameters or terms and conditions of the station authorization" and provides that such modification shall be made "upon application to and grant of such application by the Commission."¹³ Moreover, Section 25.151 provides for public notice of applications seeking major modifications of a station authorization and the opportunity to file responsive comments or petitions within 30 days.¹⁴

TMI and TerreStar further contend that as a matter of administrative law, the Commission has discretion to proceed to redistribute the spectrum via an informal adjudication without comment.¹⁵ Aside from the fact that the major change TMI is seeking with respect to its authorization is required to go on public notice under the rules,¹⁶ TMI and TerreStar ignore the Commission's "continuing spectrum management obligations to ensure that [2 GHz MSS] spectrum is used efficiently and effectively."¹⁷ Ultimately, it is the Commission's obligation to seek the best use of the abandoned 2 GHz MSS spectrum *for the benefit of the public* that must govern, rather than the private interests of TMI and TerreStar. Such a determination can only be made in a public proceeding consistent with precedent and not, as TMI and TerreStar suggest, on the basis of a stale record in the AWS proceeding compiled before the Boeing, Iridium and Celsat spectrum was surrendered.¹⁸

Pursuant to Section 1.1206 of the Commission's rules, this letter is being filed electronically with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

Diane Cornell

Diane Cornell

cc: Sam Feder
John Branscome
Paul Margie
Barry Ohlson
Donald Abelson
Rod Porter
Gardner Foster
Bruce Franca
Julius Knapp
David Furth
Uzoma Onyeije
Blaise Scinto
David Horowitz
Daniel Harrold

¹² May 27th Letter, Att. at 3.

¹³ 47 C.F.R. § 25.117; cf. *EchoStar Satellite Corporation*, 16 FCC Rcd 14300, 14303 ¶ 7 (IB 2001), *recon. denied*, 17 FCC Rcd 8305 (IB 2002). Section 25.118 allows for certain minor modifications without prior authorization, none of which include a request to increase the amount of authorized spectrum. Cf. 47 C.F.R. § 25.118.

¹⁴ 47 C.F.R. § 25.151(a)(3), (d); see also 47 U.S.C. § 309(b).

¹⁵ See May 27th Letter, Att. at 1-2.

¹⁶ The Commission must follow its own rules. See, e.g., *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir.1986) ("[A]n agency must adhere to its own rules and regulations.").

¹⁷ *AWS Third R&O*, 18 FCC Rcd at 2238 ¶ 29.

¹⁸ See *Review of Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit MSS Systems in the 1.6/2.4 GHz Bands*, Notice of Proposed Rulemaking, IB Docket No. 02-364, 18 FCC Rcd 1962, 2087-89 ¶¶ 261, 265 (2003) ("[I]t is appropriate to seek comment on both the possible reassignment and possible reallocation of any returned spectrum for possible use by other services.") (emphasis added).